



Kassilly v Turkana University College & 2 others (Employment and Labour Relations Claim E011 of 2021) [2022] KEELRC 1698 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CLAIM E011 OF 2021**

**HS WASILWA, J
MAY 19, 2022**

BETWEEN

FREDRICK NYONGESA KASSILLY CLAIMANT

AND

TURKANA UNIVERSITY COLLEGE 1ST RESPONDENT

COUNCIL, TURKANA UNIVERSITY COLLEGE 2ND RESPONDENT

COUNCIL CHAIRMAN, SOLOMON J.M MUNYUA 3RD RESPONDENT

JUDGMENT

1. The Claimant approached this Court vide a Memorandum of claim dated 23rd March, 2021 which was later Amended on the 4th October, 2021 and filed on 5th October, 2021. The Claimant sought for the following reliefs; -
 - a. An injunction do issue restraining the Respondents jointly and severally by themselves their servants, agents or any other persons acting howsoever from advertising, interviewing for recruitment or recruiting any person to the position of Deputy Principal, Academic and Student Affairs of the 1st Respondent.
 - b. An injunction do issue restraining the Respondents jointly and severally by themselves, their servants agents or any other persons acting howsoever from removing the Claimant's name from the 1st Respondent's payroll.
 - c. An order directing the Respondents jointly and severally do pay the Claimant's salaries and allowances.
 - d. A declaration that the disciplinary process conducted by the Respondents jointly and severally culminating in the dismissal of the Claimant are null and void ab initio on account of violating the 1st Respondent's Human Resource Manual.



- e. A declaration that clause 5.7.1 (b) (i) of the 1st Respondent's Human Resource Manual 2020 is null and void for want of compliance with Article 50 of the Constitution of Kenya 2010.
 - f. A declaration that the 2nd Respondent's decision to terminate the Claimant's employment vide letter dated 6th January 2021 is unfair, unreasonable, unconstitutional, and unlawful.
 - g. That the 2nd Respondent's letters issued by the 3rd Respondent dated 6th January 2021 and 5th February 2021 are null and void, set aside and cancelled for all purposes.
 - h. An order of mandatory injunction do issue against the 2nd Respondent to reinstate the Claimant to the position of Deputy Principal, Academic and Student Affairs of the 1st Respondent along with all attendant salary and without loss of any benefits.
 - i. Interest on the award-at-Court rates.
 - j. In the alternative, and without prejudice to the other prayers herein:
 - i. Balance for the remainder of the term (30 months and 15 days) = Kshs.661,325 x 30.5 = Kshs. 20,170,412.50.
 - ii. Damages for unlawful and unfair termination equivalent to twelve (12) months' salary Kshs. 661,325 x 12 = Kshs.7,935,900.00.
 - iii. Six (6) months' salary *in lieu* of Notice Kshs. 661,325 x 6.= Kshs. 3, 967,950.00.
 - iv. Gratuity at the rate of 31% of the Claimant's annual salary.
 - v. The 1st Respondent do issue the Claimant with a Certificate of Service.
 - vi. Interest at Court rates on (I),(II) (III) and (IV) above.
 - k. Costs.
2. The facts leading to this case are that the Claimant was appointed by the 2nd Respondent as the Deputy Principal Academics and Students' Affairs (DP A& SA) of the 1st Respondent vide the letter of offer dated 18th July, 2018 for a period of 5 years(Renewable). The employment took effect on the date of the offer letter.
 3. On 29th January, 2020 while he was in Vienna Austria for official duties he was appointed by the then 2nd Respondent council as the Acting Principal as the then principal Prof. Thomas Ekamais Akuja was sent on compulsory leave. Due to the Claimant's absence, Prof Tom Mokwena Nyamache was appointed as the interim Acting Deputy Principal from 30th January, 2020 to 7th February, 2020 when he came back from Vienna and took over his duties on 7th February, 2020.
 4. Before the Claimant could be issued with an appointment letter to his new office, the Boards' tenure came to an end on 5th March, 2020 and a new council formed vide appointment and gazette Notice Number 3646 dated 30th April, 2020 and published on 19th May, 2020. The appointed members were sworn into office on 27th May, 2020.
 5. Subsequently, in June 2020, the 2nd Respondent met and formalized his appointment as the Acting Principal and issued him with an appointment letter dated 17th June, 2020 for a fixed period of 6 months retrospectively commencing 29th January, 2020 which he continued to serve the Respondent as they awaited the substantive principal.



6. The Claimant continued with his work and he took his annual leave sometimes in September and while on leave, the 3rd Respondent issued him with a Show cause letter via email on the 17th September, 2020 which he learnt of on 24th September, 2020 and immediately requested for more time to respond which request did not elicit any response. That he immediately prepared a response to the Show cause letter within the limited time and served the Respondent on 30th September, 2020.
7. The Claimant was then invited for disciplinary hearing scheduled for 21st October, 2020, which he attended together with a representative from (University Academic Staff Union) UASU.
8. The charges he was facing were; insubordination of council resolution by reinstating staff to pay roll, unlawful, illegal and irregular recruitment, hiring 2 casuals against clear HRCC Min 10/14/02/2019, appointing and sanctioning the appointment of 2 nurses, failing to provide documentation of the need for the head hunted staff hired in the period which are 5 casuals, 5 interns, 2 short term contract workers and 2 nurses, Appointing of CPA Florence Ndinda as internal Auditor Grade 12, Appointment of Mr. Shadrack Muyesu as the legal officer and Appointment of Ms. Violate Simiyu as Human Resource Officer.
9. After the hearing he was dismissed on the basis of gross misconduct vide the letter of dismissal dated 6th January, 2021. The Claimant states that, the letter of dismissal contained new charges being-sanctioning illegal payment thereby causing financial loss to TUC to the extent of exposing TUC to contingent liability by instructing Mess Katiwa Advocates to mount a weak case, that he was not given a chance to defend himself on. He therefore appealed the 2nd Respondent's decision. However, the 2nd Respondent upheld the disciplinary committee decision vide its letter of 5th February, 2021.
10. The Claimant took issue with the fact that the Notice to show cause was issued by 3rd Respondent contrary to Clause D.5.2.3(b) of the 1st Respondent's Human Resource manual.
11. It is contended that the charges leveled against him were similar charges levelled against Prof. Akuja, the 1st Respondent's former Principal. These charges were captured in Claimant's NTSC dated 17th September, 2020 and Prof. Akuja's NTSC of 16th September, 2020 which charges led to the dismissal of Prof. Akuja as well.
12. The Claimant states that the charges against him were acts that were committed in the year 2018/2019 before he was the principal of the 1st Respondent and the offenses are attributable to the former principal Prof. Akuja.
13. It is contended that no investigation was carried out into the alleged acts and omission as per clause 5.2.3(a) of the 1st Respondent human Resource manual, before the Notice to show cause was issued.
14. He also contended that the appeal was to the 3rd Respondent, who was the one that issued the Notice to Show cause and the termination letter, therefore the appeal was a mere procedural act which was pre-determined as the 3rd Respondent was the accuser and the judge who was now sitting on his own appeal.
15. The Claimant also stated that the Respondent breached the Constitution, violated the Fair administrative Actions Act and its own Human resource manual when it;-
 - a. *Ultra vires* issued the NTSC Letter contrary to the provisions of D.5.2.3 on the specific procedures of the 1st Respondent Human Resource manual.
 - b. Failing to consider the disciplinary principles as per clause D.4 of the 1st Respondent's Human Resource manual with regard to the Claimant's case.



- c. Failing to wholly consider Disciplinary Principles and procedures for the alleged Gross-Misconduct as per clause D.5.2.1 and D.5.2.3 in subjecting the Claimant to a disciplinary process and in determining appropriate punishment.
 - d. Proffering different charges in the letter of dismissal dated 6th January, 2021 which were not in the Notice to Show cause dated 17th September, 2020 denying the Claimant right to be heard contrary to Article 50 of the Constitution of Kenya and Section 4 of the Fair Administrative Actions Act,2015.
16. The Claimant avers that the 3rd Respondent's powers under Clause 5.7.1(b)(i) of the 1st Respondent Human Resource manual which gives it power to unilaterally review its appeal is totalitarian in nature as it denied the Claimant right to be heard by an independent panel therefore contrary to principles of natural justice and against Article 50 of the Constitution.
 17. The Claimant then maintains that his termination from employment was unfair in the circumstances and prayed for the reliefs sought to be granted as prayed. His salary at the time of termination was Kshs 661,325.00.
 18. The Respondents entered appearance on the 14th April, 2021 and filed a response to claim on the 30th September, 2021 denying all the averments in the claim herein.
 19. The Respondent admits that the Claimant was employed as the Deputy Principal Academic and Student's Affairs of the 1st Respondent on the 18.7.2018 for a period of 5 years subject to the provisions of the Universities Act and the 1st Respondent's Human Resource Manual.
 20. Part of the Claimant's duties under his position was to carry out daily institutional assignments, developing and recommending appropriate strategies, preparing proposals, attending to personnel matters, overseeing implementation of policies, programs and ensuring compliance with laws and regulations among other responsibilities.
 21. The Respondents aver that they followed due procedure before terminating the services of the Claimant. It was stated that the Respondent's preliminary inquiry revealed probable cause that the Claimant was involved in activities that offended the law and the 1st Respondent's Human resource manual. Subsequently, that he was issued with a NTSC pursuant to provisions of clause D.5.2.3(b) of the Human Resource Manual on the 17.9.2020. This NTSC was served through the Claimant's regular email address.
 22. The Respondent then sought permission vide letter dated 2.10.2020 to carry out disciplinary measure which permission was granted by the letter of 7.10.2020. Subsequently, a disciplinary meeting was scheduled for 21.10.2020. The Claimant was given more particulars as per his request of 14.10.2021 and give green light to have counsel of his choice in the Disciplinary hearing. Consequently, the Claimant was found guilty of 5 out of 7 charges and summarily dismissed for Gross misconduct.an appeal was then lodged by the Claimant which was considered as empowered under clause D.5.7.1.
 23. The Respondent allege that the claim herein is prematurely instituted since the Claimant has not utilized the review provided for under Clause. D.5.8 and D. 5.9 of the Human Resource Manual.
 24. The Respondents contend that the charges were backed up with cogent evidence and the resultant termination was fair and done in accordance with the law.



Hearing.

25. During hearing the Claimant testified as CW-1 and adopted his witness statement dated 23.3.2021 which basically reiterated the claim herein.
26. Upon cross examination by Odongo Advocate, the Claimant testified that his appointment letter was signed by the 3rd Respondent on behalf of the 2nd Respondent which employed him. He stated that when the former principal was on compulsory leave he was appointed as the Acting Principal and his letter of appointment was signed by the 3rd Respondent who had power to carry out supervision powers over him. He then stated that he was served with the NTSC through his personal email which he read on 24.9.2020 because he was on leave. He added that the normal procedure was that such important document was hand delivered. He stated that the offenses occurred during the time when he was acting as both the acting principal and the deputy in charge of academic and student's affairs. The Claimant avers that he was not aware a response to the request of extension of time was send to him on 30.9.2020.
27. Upon further cross examination, he admitted that he was invited to the disciplinary hearing and allowed to have counsel of his choice and a colleague of his choice. He however contended that he wa not given the rules of business that showed what was expected of him. At the end of hearing he was found culpable of 5 out of 7 charges and dismissed. He stated that he appealed the decision however he did not review the appeal.
28. The Respondent on the other hand summoned three witnesses to defend this case. The first witness was Solomon John Ochuna Munyua, the 3rd Respondent herein testified as RW-1. He adopted his witness statement dated 27.9.2021 and in addition testified that he is the one responsible for recruitment of the 1st Respondent's top managers, principal and deputies and to exercise disciplinary control over them. He stated that he had powers to issue NTSC to the Claimant having been in Job group 15 while the Registrar who issues NTSC over other employees is on Job group 12 therefore that it was not proper for a junior employee to issue NTSC to a senior employee.
29. He stated that under the 1st Respondent's Human resource manual, he was empowered to sack and still seat in the appeal. The witness testified that an initial inquiry had been done by the Disciplinary Committee which was adopted by the council before disciplinary proceedings were commenced on the Claimant. He then stated that the Claimant was found guilty of 5 out of 7 charges therefore that his case should be dismissed and not reinstated as prayed in the claim.
30. Upon cross-examination, RW-1 testified that the Claimant was terminated because of recruitment of staff against procurement rules and without authority. He stated that sending the NTSC cause via email was the best option. He admitted that the Respondent did not give the Claimant more time sought even though no harm could have visited them. The witness testified further that they carried out investigations prior to service of the notice in line with clause D.5.2.3 though they did not have any investigation report. He also stated that he had powers to sign the Notice to show cause for senior officers even though the Human Resource manual provides for Registrar of Administration. He then added that this authority is not captured in the Human Resource manual. He also stated that the HR Committee is tasked under the manual to consider any disciplinary case and make recommendation to the Vice Chancellor.
31. The witness also testified that the offenses committed by the Claimant were done when he was the Acting Principal and when he was the Deputy Principal. He indicated that the Claimant was in charge of shortlisting committee as the Deputy Principal and also sat in some interviews which persons were found later to be unqualified. He also stated that the other shortlisting committee members were not subjected to any disciplinary measures.



32. On re-examination, the witness testified that the NTSC was sent via email because of Covid and the limited movement at the time. He maintained that he signed the NTSC because the Claimant was a senior officer above the rank of the Registrar. He stated that no investigations were carried out rather than an internal inquiry was done.
33. Mercy Wanjiku Kariithi, one of the 2nd Respondent's member, testified as RW-2 and adopted her witness statement dated 27.9.2021 and in brief stated that she sits in HR Appointment committee and in Academic Research collaborator extension and committee. She further stated that she chaired the disciplinary committee that handled the Claimant's case and confirmed that the minutes are a reflection of what transpired in the meeting.
34. Upon re-examination by Lutta Advocate, RW-2 testified that she only participated in the disciplinary hearing and was not aware whether the matter passed through the HR Committee before the charge sheet was prepared. The witness confirmed that there was no investigation report. He also testified that they did not make any recommendation to the VC as provided for under clause 5.2.3. because TUC did not have a VC and they had no option but to report to the council since the Claimant was a senior officer.
35. The deputy principal in charge of Administration, Finance and Planning at the Respondent, Stephen Onyango Odebero, testified as RW-3 and adopted his witness statement dated 30.11.2021. He added that the Claimant had indicated that he was subjected to disciplinary proceedings for declining to pay him KShs. 30 million however that his claim was for 24 Million which he was granted and the matter settled.
36. Upon cross examination by Lutta Advocate, the witness testified that he had no personal issue with the Claimant. He also stated that he was paid his claim of 24 Million and he later left the Respondent employ on 29th January, 2021 after his contract ended.

Claimant's Submissions.

37. The Claimant submitted that due process was not followed in his summary dismissal. He argued that before a notice to show cause is served, preliminary investigation ought to be carried out in accordance with Clause D.5.2.3(a) of the Human resource manual. It was submitted that as per clause D.5.2.3(b) the person authorized to issue Notice to show cause is the Registrar Administration and not the chairman of the council as seen in his case. It was further argued that after disciplinary hearing a report containing the recommendations of the disciplinary committee was to be served upon the Vice chancellor for further action which was not done in his case. He added that the chairman of the board acted ultra vires in terminating his services and therefore that the entire disciplinary procedure was not up to par.
38. On whether there was a valid reason for termination, the Claimant submitted that none of the charges levelled against him were proved, for instance he argued that charge number 5 which stated that the Claimant allowed suspended staff to access TUC and its property was never substantiated, on the contrary the Claimant reported the said trespass by the then suspended principal Prof Akuja and obtained OB number 53/6/5/2020, which fact was affirmed by the Respondent's witness. On the allegation of sanctioned illegal payment, the Claimant argued that no evidence was tendered either in disciplinary hearing or in this Court to confirm the said allegation on the contrary that Charles Rop, Peter Edome and Daruis Bosire affirmed during disciplinary hearing that no money was paid out to the Claimant. On the charge of refusing to furnish the council with minutes of previous meeting, the Claimant argued that those minutes were in Prof. Akujas office which had been marked as a crime scene by EACC therefore accessing any document in that office was impossible, a fact that was corroborated



by Paul Odongo during the disciplinary hearing, on the charge of insubordination and removal of workers from payroll, it was confirmed by the said Prof. Odebero was not in the payroll as such there was no action which had been taken to the contrary by the Claimant and on the last charge of failing to provide official documents to the council. The Claimant argued that the same were under custody of the previous Principal which document he could not access.

39. Accordingly, it was argued that the charges that formed the reason for his termination were never proved. Therefore that termination failed its substantive fairness. To support his case the Claimant cited the case of *Peter Wangai v Egerton University* [2019] eKLR where the Court held as follows;-

“Where there is no genuine reasons leading to termination of employment, to proceed and dismiss the employee such amounts to unfairness as there is no valid or fair reason existing to justify the same. Even where all procedural requirements are followed, such does not negate the lack of a substantive reasons leading to termination of employment... A sham trial process does not sanitise an unfair termination of employment.

92. In this case, the allegations made against the Claimant were without basis, they lacked material evidence and the findings by the Council to Dismiss the Claimant from service for gross misconduct was at variance with the findings and defences made. Such resulted in unfair termination of employment and contrary to section 43 and 45 of the *Employment Act, 2007*.”

40. On the prayers sought, the Claimant prayed for reinstatement as provided for under section 49(3)(a) of the *Employment Act*. He then relied on the case of *Walter Kiplagat Serem v Turkana University College council* [2020] eKLR where the Court relied on the case of *Anne Wambui Kamuiru v Kenya Airways Limited* [2010] eKLR and held as follows;-

“This Court is alive to the fact that an employer has a right to institute disciplinary process. This Court is however clothed with power to intervene and ensure that a fair disciplinary process is adhered to.²⁵ In *Anne Wambui Kamuiru VS Kenya Airways Ltd* (2010) eKLR this Court made a finding as follows;

- “32. There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is clothed with irregularities on or is stage managed towards dismissal”.

26. Having stated as above and having found the process in place flawed, I find that indeed this Court can and must interfere with a flawed disciplinary process in order to have it put on the right track.”

41. Accordingly, the Claimant submitted that he has meet all the conditions provided for under section 49(4) of the *Employment Act* for reinstatement. He argued that his reinstatement to his position of being Deputy Principal Academic and Students affairs will be of help to the 1st Respondent and its students at large. In this he relied on the Court of appeal case of *Judicial service commission v Joseph Riitho Ndururi* [2021] eKLR.

42. In the alternative the Claimant prayed for the payment of the other reliefs sought in the Claimant and argued that having proved his claim on a balance of probability he ought to be compensated.



Respondent's Submissions

43. The Respondent on the other hand submitted on three issues, Whether the entire disciplinary process was a nullity, whether the Claimant's termination was lawful and whether the Claimant is entitled to the reliefs sought.
44. On the first issue it was submitted that that the Claimant has failed to prove the allegation of unfair labour practices and the claim for witch-hunt and malice pleaded in his claim as provided for under section 107 and 108 of the *Evidence Act*. On the contrary it was submitted that at the time the disciplinary proceedings were carried out against the Claimant, there was reasonable and probable cause to believe that the Claimant had misconducted himself as provided for under section 47 of the *Employment Act*. It was then argued these reasons were captured in the Notice to show cause.
45. On whether the 3rd Respondent had authority to issue the NTSC to the Claimant, it was submitted that clause D.2 of the Human resource manual empowered the Council to carry out disciplinary proceeding for officers above Grade II . it was then argued that even if the 3rd Respondent was not authorized the Claimant was not prejudiced in any way when served by the 3rd Respondent.
46. On whether the Vice chancellor was involved in the disciplinary process, it was submitted that the Notice to Show cause was copied to the Vice chancellor of MMUST together with subsequent correspondences regarding the disciplinary process. Additionally, that the report of the disciplinary committee was presented to the council which Vice chancellor is a member pursuant to Section 36 of the *Universities Act*, as such the VC was aware of the proceeding. It was further argued that the VC is an ex officio member who is not empowered to vote but to guide the Council therefore that the decision is made by the council with concurrence of the VC. In addition, it was argued that the Claimant was employed by the 2nd Respondent and not the Vice chancellor and therefore ought to be fired by the appointing authority. The Respondent then submitted that, before the Claimant was terminated, the cabinet secretary was informed vide the letter of 7th October, 2020.
47. The Respondent submitted that it was not mandated to carry out preliminary investigation before issuing the Notice to show cause. He submitted that clause D.5.3 are not couched in mandatory terms rather states that investigation can be carried out where its necessary. It was argued that the basis of charging the Claimant was derived from departmental inquiries and consultations which were enough. It further submitted that the charges against the Claimant were different from the charges against his predecessor prof. Akuja.
48. On whether the Claimant was unfairly terminated, it was submitted that that the Respondent has proved the charges leveled against the Claimant as captured in the Notice to show cause and argued that the Respondent was only required to justify that there was a probable cause to accuse the Claimant.
49. On the Procedure followed, the Respondent submitted that the Claimant was issued with a notice to show cause, invited to disciplinary hearing which he participated in, and the Claimant was then found culpable of 5 out 7 charges and terminated in accordance with procedure. It was therefore submitted that the termination met substantive and procedural fairness. In support of his argument the Respondent relied on the case of *Reuben Ikatwa & 17 others v Commanding officer British Army training Unit Kenya and another* [2017] eklr.
50. On the remedies sought, the Respondent submitted that as much as this Court is empowered to reinstate the Claimant to employment, the clamant has not proved any special circumstances that would warrant his reinstatement as was held in *Kenya Power and Lighting Company Limited v Aggrey Lukorito Wsike* [2017] eklr.



51. The Respondent then submitted, with regard to the other prayers, that the Claimant has failed to prove his case and therefore not entitled to the prayers sought.
52. I have examined the evidence and submissions of the parties herein. The issues for this Court's consideration are as follows;-
 - a. Whether there were valid reason to warrant the Claimants dismissal.
 - b. Whether due process was followed before the Claimants dismissal.
 - c. Whether the Claimant is entitled to the remedies sought.

Issue I – Reason

53. The Claimant was summarily dismissed from employment vide a letter dated 6/1/21 which indicated that he had been found guilty of the following charges;

“RE: SUMMARY DISMISSAL FOR GROSS MISCONDUCT

Following the notice to show cause letter dated 17th September 2020, the Disciplinary Committee of Council (DCC) processed your disciplinary proceedings as mandated by Council minute 11/07/10/2020.

You were invited to appear before the committee on 21st October 2020 and the proceedings concluded on the same day. 7 charges had been laid upon you to defend yourself. The findings reached by the Committee are that 5 out of the 7 charges have been proven and therefore were founded. The 2 charges that were not proven and therefore were not founded are 6 and 7. The proven charges are 1, 2, 3, 4 and 5 as follows;

1. Failure to provide official documents and deliberately hiding information from the council including lying.
2. Insubordination of Council resolutions by reinstating staff to the payroll against the Council resolution, putting others without authorization and sanctioning ghost workers in the payroll and irregularly removing others from payroll.
3. Unlawful, illegal and irregular staff recruitment 2019/2020, to the extent of those employees you participated in short listing. This amounts to abuse of office and breach of trust, contrary to the Public Officers Ethics Act, Anti-Corruption and Economic Crimes Act amongst others.
4. Sanctioning illegal payments thereby causing financial loss to TUC (CBA and private lawyers), to the extent of exposing TUC to contingent liability contrary to Public Finance Management Act by instructing M/s. Kitiwa Advocates to mount a weak defence against Moses Ekal's case so as collapse the Council's case in favor of Prof. Thomas Akuja and therefore defeat justice.
5. Allowing suspended staff to access and use TUC property.

Having weighed the determination/ruling of the Disciplinary Committee of Council and the mitigation you provided, Council resolved to summarily dismiss you as the Deputy Principal, Academics and Students Affairs for gross misconduct with immediate effect. The gross misconduct proven is consistent



with neglect of duty, insubordination and occasioning financial loss to TUC, all grounds for summary dismissal set in Section 44 of the [Employment Act](#) and the Human Resource manual of TUC. Please note section 44(4) of the [Employment Act](#) states that any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause if;

- a. An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
- b. An employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
- c) An employee commits, or on reasonable and sufficient grounds is suspended of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

You are, therefore, required to clear with TUC as per the policies and return all the TUC's assets in your possession to the acting Principal, Prof. George Chemining'wa on Friday, 8th January, 2021. You will be paid all your salary up to the date of dismissal and net terminal dues, upon clearance with management.

A right of appeal to the determination/ruling by the disciplinary committee lies to the Council within fourteen (14) days as per clause D. 5.7 of the human resource manual. I take this early opportunity to thank you for the service to TUC and wish you well in all your endeavors.”

54. He was dismissed for reason of gross misconduct in that he neglected his duty, he was insubordinate and occasioned financial loss to TUC under Section 44 of the [Employment Act](#) and TUC HR Manual.
55. Before this dismissal, the Claimant had been issued with a show cause letter 17/9/2020 wherein he was asked to show cause why disciplinary action should not be taken against him. The letter stated that he had committed misconducts as follows:-
 1. Failure to provide official documents and deliberately hiding information from the council including lying.
 2. Insubordination of Council resolutions by reinstating staff to the payroll against the Council resolution, putting others without authorization and sanctioning ghost workers in the payroll and irregularly removing others from payroll.
 3. Unlawful, illegal and irregular staff recruitment 2019/2020, to the extent of those employees you participated in short listing. This amounts to abuse of office and breach of trust, contrary to the Public Officers Ethics Act, [Anti-Corruption and Economic Crimes Act](#) amongst others.
 4. Sanctioning illegal payments thereby causing financial loss to TUC (CBA and private lawyers), to the extent of exposing TUC to contingent liability contrary to [Public Finance Management](#)



Act by instructing M/s. Kitiwa Advocates to mount a weak defence against Moses Ekal's case so as collapse the Council's case in favor of Prof. Thomas Akuja and therefore defeat justice.

5. Allowing suspended staff to access and use TUC property.
 6. Neglecting duty by failing to organize, coordinate and facilitate adequate security at TUC. An example was that on 2/3/2020 unknown people were allowed to access TUC, stormed into a council meeting and demanded to be addressed by the council.
 7. Illegal use of the institutions vehicle and other facilities.
56. The Claimant responded to this show cause letter vide a letter dated 24th September, 2020 asking to be given more time to respond to the show cause letter having just received the show cause letter on that day. He requested for one more week to respond and file his response by 8th October 2020 instead of 1/10/2020.
57. The Respondents admitted that they got request for extension of time but didn't respond.
58. On 30/9/2020, the Claimant responded to the show cause and in response to the issues raised he indicated;-
1. In 2018 – 2020 he was not substantive holder of the office of the principle then and that the substantive holder Prof Akuja had not handed over the said records when he was sent on compulsory leave. He indicated that he made efforts to get the said minutes and were subsequently handed over to the office of AG Principal Prof. Chemngwa on the 17th August 2020.
 2. In relation to some new staff personnel files, he indicated that though the show cause letter referred to HRCC meetings being held on 22/1/2020, his investigation revealed that no such meetings took place. He also indicated that on 22/1/2020 he was not the AG Principal of the university.
 3. In relation to list of employees recruited in 2019/2020 financial year, he indicated that in 2019 he was not AG Principal of the college and had no information on the 41 employees alleged.
 4. On insubordination he indicated that in 2019 November he was not AG Principal and could not have removed Pauline Akiru from payroll without following due process before termination as provided for under Section 41 of the Employment Act 2007.
He averred that Pauline was reinstated to the payroll in good faith to avert unnecessary protracted litigation as the college had been burdened by a plethora of cases against it. He even cited the minutes of the Council Audit Risk Management and Compliance Committee held on 21/11/2019 which resolved that alternative means of dispute resolution be put in place to avert the high number of cases that had been lodged against the university by staff.
 5. As concern removal of Shadrack Muyesu and Violet Simiyu from the payroll he indicated he was then the substantive Deputy Principal Academic and Student Affairs and his mandate did not include removal of staff from the payroll.
 6. On issue of removal of Prof. Odebero from the payroll, the Claimant indicated that the said Prof. had never been on payroll of the Respondent and so issue of removal could not arise. He attached the Professor's payslip from Masinde Muliro of July 2017 when he was on secondment to TUC to prove this point. The matter was also filed before Eldoret ELRC



and the Court didn't issue interlocutory orders and so a full hearing on the matter had to be awaited.

7. On appointment of 3 tutorial fellows he denied ever recruiting such. He also denied appointing Florence Nduda, Shadrack Muyesu, Violet Simiyu and casuals, interns and nurses as indicated. He indicated that the appointment letters were not signed by him.
 8. On issue of payment sanctioned by the CBA, the Claimant indicated that the CBA had an approved and agreed package for all staff and was not restricted to staff absorbed from Mount Kenya University only.
 9. On issue of engaging private lawyers, he indicated that the allegation was vague and the only firm referred to was Kitiwa & Co. Advocates. He stated that matters brought against the university came under Certificate of Urgency and there was limited time to consult the office of the AG.
 10. On allowing suspended officers to access TUC and TUC the Claimant denied this accusation saying he actually prevented them from accessing the University premise. He denied allowing Professor Akuja to use a university vehicle. He also denied allowing lapse of security at the university.
 11. On use of institution vehicle and transport allowance he denied this issue. He indicated he used the vehicle only for official business on 27/5/2020 and spent his night at Sirikwa Hotel on 27/5/2020. He attached the work ticket, permission to travel during curfew time by the Ministry of Education and invoice from the Sirikwa as an exhibit.
59. After all these NTSC and the reply, the Claimant was invited to appear before a disciplinary of the 2nd Respondent on 21/10/2020.
60. After the hearing at the disciplinary committee, the Claimant was found guilty of charges 1 to 5 in the NTSC and absolved of charges 6 & 7 in the NTSC which relate to neglect of duty by failing to organize, coordinate and facilitate adequate security and illegal use of 1st Respondents vehicle and other facilities.
61. I have looked at the charges tendered against the Claimant and his responses thereto.
62. The Claimant was very elaborate in his responses. He responded to all accusations with attendant exhibits to prove himself.
63. As elaborated above, he elaborated that some of the issues he is accused of doing he couldn't have done either because he was not the one responsible or was not holding the office responsible.
64. Example is about issue of providing minutes for 2019/2020 wherein he explained that those had not been handed over to him by Prof. Akura when he was sent on compulsory leave.
65. Indeed no handing over report was exhibited by the Respondents to prove otherwise.
66. He was even accused of an act committed on 22/1/2020 in addition to recruitment of employees in 2019/2020 financial year yet he had been appointed on 29/1/2020 and the letter reference relates to a meeting held on 22/1/2020.
67. On insubordination levelled against him, he explained why to have acted as expected would have put the Respondent in more financial difficulties because removing employee from the payroll involves due process as provided under Section 41 of the *Employment Act* 2007 and thus more litigation would have ensued.



68. In this Court’s view, the Claimant acted prudently in the circumstances and even mitigated more loses against the Respondent who would have been subjected to more litigation for unfair termination.
69. In the understanding of this Court, the reasons leading to the Claimant’s termination were not valid as the Claimant explained himself but the Respondents chose not to consider his defence.
70. Section 43 of the [Employment Act 2007](#) states as follows;
- “43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.
71. The Respondents in my view have not established the validity of the reasons leading to the Claimant’s termination and I find that so.

II. Due Process

72. The Claimant submitted that he was not subjected to a fair due process before his dismissal. He cited various instances that he contends were in breach of the law and the Respondent’s HR Manual. The Respondents insist that due process was followed before the Claimant’s dismissal.
73. The Claimant pointed out that the NTSC letter was issued contrary to the provision of clause D.5.2.3 of the Respondents HR Manual. Clause D.5.2.3 of the Respondent’s Manual provides as follows;
74. “Specific Procedures
- a. Carry out a preliminary investigation and consultation as to the circumstances surrounding the act of misconduct.
- b. The Registrar (Administration) will issue a notice to show cause detailing the nature of the offence and giving the staff a period of not less than fourteen (14) days from the date of service.
- c. If the officer fails to respond within the specified period (14 days) or if in the opinion of the Authorized Officer, the explanation given is not satisfactory he shall forward the case with copies of the charge and the officer’s reply if any, with his comments to the Disciplinary Committee for decision.
- d. The staff shall be required to appear in person before the Disciplinary Committee and may be accompanied by union officials or another member of staff of his/her choice.
- e. The Disciplinary committee shall consider the case and make recommendations to the Vice Chancellor for consideration.
- f. A report concerning the disciplinary proceedings (hearings) against a staff shall include the following;
- i. The name of the staff and the personal file number;
- ii. Designation;



- iii. A statement covering the misconduct or accusations against the staff;
- iv. Action so far taken by the supervisor responsible;
- v. A statement of defence made by the accused staff to exonerate him/herself;
- vi. The comments of the responsible supervisor regarding the accused staff defence and the gravity of the offence; and
- vii. A specific recommendation on the course of action or punishment to be preferred.”

75. Indeed the Claimants NTSC was issued by the Council Chairman Dr. Solomon J. Munyua. This was in contravention of clause D.5.2.3 cited above which states that the NTSC shall be issued by the Registrar (Administration).

76. The Respondent tried to explain that the 3rd Respondent herein had to issue the NTSC because Clause D 2 of the HR Manual empowered the Council to carry out disciplinary proceedings for officers above Grade II. Clause D2 provides as follows;

“D.2 DISCIPLINARY COMMITTEES

Disciplinary matters shall be handled by the following committees:

Disciplinary committee of Council for staff in Grade 11 and above

Disciplinary committee under Deputy Principal AFP for staff in Grades 1 – 10.”

77. There is no indication whatsoever that the chairman of counsel had authority to issue the NTSC under clause D.2. It is therefore true that the NTSC was issued by an authorised person. The Claimant also submitted that the charges he faced were similar to those levelled against the 1st Respondent’s former principal for acts committed in 2018/2018 even before the Claimant became the principal.

78. Indeed this contention had been discussed as his Court considered the validity of reasons leading to the Claimant’s dismissal and established that some of the charges levelled against him concerned matters done or omitted to be done when Claimant was not the Principal of the Respondent.

79. The Claimant also submitted that clause D. 5. 2. 3(a) mandated the Respondent to carry out a preliminary investigation before issuing a NTSC but that no such investigation was ever done.

80. The Respondents RW1 admitted that no investigation was ever done. This was then in breach of Clause D. 5. 2. 3(a) of the Respondents HR Manual.

81. The Claimant further submitted that the 3rd Respondent’s powers under Clause 5.7.1(b)(i) of considering appeals of the disciplinary committee is totalitarian in nature because it denied him a right to be heard by an independent panel and was contrary to principles of natural justice.

82. It is indeed true that the NTSC served upon the Claimant was issued by the 3rd Respondent Council Chairman, the same chairman sat in the disciplinary committee that heard the Claimant’s case. The same 3rd Respondent is the one who signed the Claimant’s letter of dismissal. The 3rd Respondent also considered the appeal of the Claimant and rejected it.

83. The entire scenario that plays above is an indication that the 3rd Respondent was the accuser, jury and judge in the case of the Claimant. This indeed was a clear breach of the Claimant’s right to fair hearing.



84. Other than the fact that the 3rd Respondent acted in excess of his powers, the contract of appointment of the Claimant stated as follows;

“ d.

e. The Council may recommend to the Cabinet Secretary in charge of University Education to terminate your appointment by giving you a six (6) months basic salary and a hearing notice.

Termination of this contract shall be done in accordance with the provision of the University College Human Resource Manual, the *Employment Act* or any other relevant legislation.”

85. The 3rd Respondent as Council Chair having terminated the services of the Claimant acted ultra vires his powers. This was a clear breach of rules of natural justice and provision of the fair Administration Action Act 2015 Section 7 (2) which states as follows;

7. Institution of proceedings

(1)

(2) A Court or tribunal under subsection (1) may review an administrative action or decision, if–

(a) the person who made the decision–

(i) empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to–



- (i) the purpose for which it was taken;
- (ii) the purpose of the empowering provision;
- (iii) the information before the administrator; or
- (iv) the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

86. Whereas the 3rd Respondent acted as he did, the law was breached and therefore the entire disciplinary process was flawed and in breach of the principles of natural justice and is therefore illegal, null and void.

87. Section 45(2) of the [Employment Act](#) 2007 states as follows;

“45.

- (1)
- (2) A termination of employment is unfair if the employer fails to prove-
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure”.

88. Since the Claimant was dismissed without valid reasons and without following due process, I find the dismissal of the Claimant unfair and unjustified and I declare it so.

Issue III – Remedies

89. The Claimant sought this Court’s direction to compel the Respondents to pay him, his salaries and allowances and a declaration that the dismissal was null and void *ab initio*.



90. I have already declared the dismissal illegal, null and void. The Claimant also sought to be reinstated to his position as Deputy Principal, Academic and Student Affairs along with all attendant salary and without loss of any benefit.
91. Having considered the fact that indeed the Claimant's dismissal was flawed and given that his illustrious career was interfered with by the Respondent unfairly, I find that the only remedy that would adequately compensate the Claimant would be a reinstatement which I grant accordingly and also order that the Claimant's reinstatement be coupled with payment of any back pay from the time of dismissal to date without loss of any salaries or benefits.
92. The Respondents will henceforth continue paying his salary and emoluments when due until he serves his contract or is otherwise dismissed fairly for any other reason or cause.
93. In the alternative the Claimant is free to consider payment of the balance of the remainder of his contract term which is 30 months & 15 days = $661,325 \times 30.5 = 20,170,412.20$ and also the following;
1. Damages for unlawful dismissal at 10 months salary $10 \times 661,325 = 6,613,250$
 2. 6 months salary in lieu of notice $\text{kshs.}661,325 \times 6 = 3,967,950/=$ as per his letter of appointment.
 3. Gratuity at the rate of 31% of the Claimant's salary for the contract period.
 4. The 1st Respondent to issue Claimant with certificate of service.
 5. The Respondents will pay costs of this suit and interest at Court rates on the amounts payable. The amounts payable are less statutory deductions.
94. These are the orders of this Court.

DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF MAY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Lutta for Claimant – present

Odongo for Respondents – present

Court Assistant - Fred

